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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 380

EDWIN B. COVEY, Committee of the Person and Prop-
erty of NORA BRAINARD, an Incompetent,
Appellant,
against
TOWN OF SOMERS,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE
OF NEW YORK

**BRIEF FOR THE STATE OF NEW YORK
AS AMICUS CURIAE**

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Jurisdiction

This appeal was taken under 28 U. S. C., § 1257(2) from a final order of the Court of Appeals of the State of New York; entered on February 28, 1955, and amended April 21, 1955 (R. 19, 21), unanimously affirming an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered on April 12, 1954 (R. 15), and answering in the affirmative the question certified by that Court—"Was the order of

this Court entered April 12, 1954 properly made as a matter of law?" The order of the Appellate Division, with one justice dissenting, affirmed an order of the County Court of Westchester County entered on December 16, 1953, (R. 2) denying a motion by appellant as committee of an incompetent (1) to open a default in a foreclosure of a tax lien action *in rem* brought pursuant to Article VII-A, Title 3, of the New York Tax Law, (2) to vacate the judgment of foreclosure entered therein, and (3) to set aside the deed delivered pursuant to the judgment.

Probable jurisdiction of the appeal to this Court was noted by order dated November 7, 1955 (R. 22).

This brief is submitted by the State of New York as *amicus curiae* in accordance with the provisions of Rule 42(4) of the rules of this Court in order to set forth the views of the State of New York as to the validity, under the Constitution of the United States, of Section 165 *et seq.* of Article VII-A, Title 3, of the New York Tax Law as applied to appellant's incompetent.

Opinions of the New York Courts

No opinion was rendered by the Court of Appeals, but a memorandum of affirmance prepared by the State Reporter is reported in 308 N. Y. 798. The Court of Appeals denied a motion by appellant for reargument but granted a motion for amendment of its remittitur stating that:

"Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz., Whether the taking by the Town of Somers, of the property here involved, was, on this record, a deprivation of due process and equal protection of the laws under the Fourteenth Amendment. The Court of Appeals held that there was no denial of any constitutional right of the peti-

tioner (See Matter of Town of Somers v. Covey, 308 N. Y. 798) (R. 21-22).

This memorandum decision is reported in 308 N. Y. 941. The majority and dissenting opinions of the Appellate Division (R. 16-17) are reported in 283 App. Div. 883. The opinion of the County Court of Westchester County (R. 12-13) was not reported.

Question Presented

Has the appellant's incompetent been deprived of her property without due process of law by the application, prior to any determination of her incompetency, of the New York Tax statute providing for foreclosure of tax liens by actions *in rem*, on notice by publication, posting and mailing of opportunity to redeem, and providing a remedy by action to question the regularity of the proceedings when appellant, although judicially advised of the proper remedy, neglected to pursue it notwithstanding that he had ample time to do so?

Article VII-A, Title 3 of the New York Tax Law

The text of Title 3 of Article VII-A of the New York Tax Law, at the time the proceedings were had herein, is set forth in Appendix A of the brief for appellant. The provisions thereof are entitled "Foreclosure of Tax Lien by Action *in Rem*" and, to the extent relevant, are in substance:

When a tax district owns a tax lien due and unpaid for a period of at least four years, such tax lien shall be summarily foreclosed by the district (§ 165):

Such tax district shall file in the office of the clerk of the county a list of all parcels of property affected by such unpaid tax liens:

No parcel shall be excluded from such list except for certain specified reasons (not here pertinent);

The collecting officer shall file a duplicate of each list in the office of such collecting officer, in the office of the attorney for such tax district and each such list shall be designated as "List of Delinquent Taxes";

Each list shall contain a brief description of each parcel, the name of the last known owner, the statement of the amount of each tax lien and shall be verified by affidavit of the collecting officer:

"The filing of such list of delinquent taxes in the office of the clerk of the county in which the property subject to such tax liens is situated shall constitute and have the same force and effect as the filing and recording in said office of an individual and separate notice of pendency of action and as the filing in the county court of such county * * * of an individual and separate complaint by the tax district against the real property therein described, to enforce the payment of the delinquent taxes; assessments or other lawful charges which have accumulated and become liens against such property." (§ 165-a, 1);

Every person having any right, title or interest in any parcel described in such list may redeem such parcel by paying all the sums mentioned in such list before the expiration of the redemption period mentioned in ~~the~~ notice pursuant to § 165-b, or may serve a duly verified answer upon the attorney for the tax district setting forth any defense or objection for the foreclosure of the tax lien;

Such answer must be filed in the office of the county clerk and served in the office of the attorney for the tax district foreclosing within twenty days after the date mentioned in the notice published pursuant to § 165-b as the last day for redemption;

"In the event of failure to redeem or answer by any person having the right to redeem or answer such person shall be in default and shall be barred and forever foreclosed of all his right, title and interest in and to the parcels described in such list of delinquent taxes and a judgment in foreclosure may be taken as herein provided." (§ 165-a, 2);

Upon the filing of such list in the office of the county clerk the collecting officer forthwith shall cause a notice of foreclosure to be published at least once a week for six successive weeks in two newspapers designated by him and published in the tax district. Such notice shall be entitled "NOTICE OF FORECLOSURE OF TAX LIENS BY BY ACTION *IN REM*", and shall state, among other things, "No personal judgment shall be entered herein for such taxes, assessments or other legal charges or any part thereof", and the day, at least seven weeks from the date of the first publication of the notice, thereby fixed as the last day for redemption;

The collecting officer shall cause a copy of such notice to be posted in certain places and shall cause a copy of such notice to be mailed to the last known address of each owner of property affected thereby (§ 165-b);

"The provisions of this title shall apply to and be valid and effective with respect to all defendants even though one or more of them be infants, incompetents, absentees or non-residents of the State of New York." (§ 165-g);

The court shall make a final judgment awarding to such tax district the possession of any parcel not redeemed and as to which no answer is interposed, and shall direct the collecting officer to prepare and execute

a deed conveying to such tax district full and complete title to such lands. "Upon the execution of such deed, the tax district shall be seized of an estate in fee simple absolute in such land and all persons, including the State of New York, infants, incompetents, absentees and non-residents who may have had any right, title, interest, claim, lien or equity of redemption in or upon such lands shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption." (§ 165-h, 6);

Every such deed given "shall be presumptive evidence that the action and all proceedings therein . . . and all notices required by law were regular and in accordance with all provisions of law relating thereto. After two years from the date of the record of such deed, the presumption shall be conclusive, . . . No action to set aside such deed may be maintained unless the action is commenced and a notice of pendency of the action is filed in the office of the proper county clerk prior to the time that the presumption becomes conclusive as aforesaid." (§ 165-h, 7).

Statement

The facts set forth in the record made in the County Court of Westchester County, which record consists solely of (1) the order to show cause by which this motion was brought on, (2) an affidavit of appellant and (3) an affidavit of his attorney, are most enlightening when stated chronologically.

April 29, 1932—A "List of Delinquent Taxes" for the Town of Somers was filed with the County Clerk of the County of Westchester.

A certified copy of said list was filed in the office of the Town Attorney.

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A certified copy of said list was also filed with the Receiver of Taxes of the Town of Somers (R. 9).

April 30, 1952—The Receiver of Taxes of the Town of Somers posted notices designated "Notice of Foreclosure of Tax Liens by the Town of Somers by Action *in rem*" in several post offices located in the town.

The Receiver also mailed a notice, together with a statement addressed "To the party to whom the enclosed notice is addressed" to each person named in the "List of Delinquent Taxes", to the last known address of such person.

"Upon information and belief" one of the persons to whom such notice was mailed was ~~Nora~~ Brainard (R. 8).

May 8, 1952—This *in rem* action, the judgment in which was sought hereby to be vacated by motion, was commenced by the Town of Somers by the publication of a "Notice of Foreclosure of Tax Liens" in two local newspapers serving the town (R. 8).

July 22, 1952—The Receiver of Taxes of the Town of Somers filed an affidavit in this action with respect to the filing of the verified list of delinquent taxes with the County Clerk; the designation of the aforesaid newspapers for publication and the publication therein of such notice, the posting of the aforesaid notices, and the mailing of a notice to each person named in the "List of Delinquent Taxes" (R. 8).

July 23, 1952—The Town Attorney filed an affidavit in this action with respect to the filing of the aforesaid "List of Delinquent Taxes" with the County Clerk; the filing of a certified copy of said list in his office, the filing of a certified copy of such list with the Re-

ceiver of Taxes of the Town of Somers, the posting of the aforesaid notices, the publications of notice and mailing of notices. °

The affidavit stated in part:

"That more than twenty days have expired since the date fixed as the last date for the redemption in said notice of foreclosure, and no party or owner has filed an answer to this action",

"The time of each and every person to appear or answer has now expired and all of the parties are now in default for want of pleading." (R. 9)

July 24, 1952—Appellant, "not knowing" Nora Brainard, was appointed special guardian of the interests of persons affected by the action who were in military service (R. 9).

September 8, 1952—Judgment of foreclosure was entered against certain property of Nora Brainard upon her default and upon the consent of appellant as special guardian of the interests of persons in military service, said consent having been given after an investigation by him disclosed that not one of the persons named in the tax delinquent list was in military service (R. 5, 8, 9).

October 24, 1952—A deed to the aforementioned property of Nora Brainard was delivered to the Town of Somers and duly recorded (R. 5).

Under the aforesaid provisions of subdivision 7 of section 165-h of the New York Tax Law this deed then became "presumptive evidence that the action and all proceedings therein and all proceedings prior thereto from and including the assessment of the lands affected and all notices required by law were regular and in

accordance with all provisions of law relating thereto."

October 29, 1952—Five days after the delivery of the deed Nora Brainard was adjudicated a person of unsound mind (R. 8).

November 6, 1952—Nora Brainard was admitted to the Harlem Valley Hospital (R. 8).

January 30, 1953—Appellant was appointed committee of the person and property of Nora Brainard, an incompetent, by order of the judge of the County Court of the County of Westchester (R. 7).

September 15, 1953—The attorney for appellant appeared before the Town Board and offered to the town officials the tax arrears, interests, penalties, foreclosure costs and the costs of maintenance, adding to approximately \$480, on behalf of the incompetent and her committee in consideration for the return of the deed to the aforesaid property, but this offer was refused (R. 6-7, 11).

October 21, 1953—The attorney for appellant verified an affidavit wherein he said in part:

"From investigation made by me and from conversations had with the duly elected officials of the Town of Somers, I am of the opinion that the said Nora Brainard was and has been an incompetent for more than 15 years. I have been advised that more than 2 years ago efforts were made by one of the Justices of the Peace of the Town of Somers to have her committed to Grasslands Hospital, a State Hospital for Mental Defectives, by reason of her mental condition. I have been further advised that on many occasions the State Police were called to abate the nuisances committed by the said Nora Brainard. That she had no living relatives in this State."
(R. 5)

Appellant verified an affidavit wherein he said, in part, that subsequent to the entry of the judgment of foreclosure on September 8, 1952:

" * * * I was retained by the Northern Westchester Bank, for the purpose of instituting an action to foreclose a mortgage upon the said property owned by the incompetent, and upon investigating the same, learned of the mental capacity of the said Nora Brainard, and by reason thereof withheld proceeding with said action, knowing from my investigation that she was a person of unsound mind and unable to understand the nature of her acts or the nature of process to be served upon her. This information, which I then gained, was available to all persons in the Town of Somers, from mere investigation or conversation with the neighbors of the incompetent." (R. 9-10)

October 22, 1953—On the aforesaid affidavits of appellant and his attorney a judge of the County Court of the County of Westchester issued an order to show cause why an order should not be made opening the default of Nora Brainard, one of the persons referred to in the "Notice of Foreclosure of Tax Liens in the Town of Somers, *in Rem*"; why the judgment entered therein should not be vacated; why the deed delivered to the town should not be set aside and why Nora Brainard, an incompetent, by her committee should not be permitted to answer or appear or otherwise move with respect to the aforesaid notice of foreclosure (R. 3-12).

The order to show cause stayed the sale of the property for a minimum price bid of not less than \$3500 scheduled for October 24, 1953. (R. 4, 11)

December 3, 1953—The County Court of the County of Westchester rendered an opinion denying the aforesaid motion to open the default, to vacate the judg-

ment of foreclosure, to set aside the deed, and to permit the defendant by her committee to appear in the *in rem* proceeding.

In that opinion the Court pointed out:

" * * * that the procedure adopted by the applicant is improper. Subdivision 7, section 165-h of the Tax Law provides substantially that there is a conclusive presumption after two years from the date of the recording of the deed that the action and all proceedings were regular and in accordance with the provisions of law relating thereto, and further provides 'No action to set aside such deeds may be maintained unless the action is [fol. 18] commenced and a notice of pendency of the action is filed in the office of the proper County Clerk prior to the time that the presumption becomes conclusive * * *'. In the case at bar no action to set aside the deed has been commenced and no *lis pendens* has been filed although the time that the presumption becomes conclusive has not expired. * * *' (R. 12-13).

The aforesaid presumption created by Subdivision 7 of section 165-h of the New York Tax Law would not become conclusive until October 24, 1954, nearly a year later, because, as noted above, that subdivision provides in part: "After two years from the date of the record of such deed, the presumption shall be conclusive * * *".

December 16, 1953—An order was made and entered in the office of the County Clerk of Westchester County denying the aforementioned motion (R. 2-3).

December 23, 1953—Appellant appealed to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from the final order of the County Court denying the aforesaid motion (R. 1-2).

April 12, 1954—An order was made by the Appellate Division affirming, with one justice dissenting, the aforesaid order of the County Court of the County of Westchester (R. 15-16).

At that time appellant still had six months within which to bring an action under Subdivision 7 of section 165-h of the New York Tax Law.

June 1, 1954—The Appellate Division granted a motion by appellant for leave to appeal to the Court of Appeals from its order and certified the question above quoted (R. 14-15).

October 24, 1954—The presumption of regularity created by Subdivision 7 of section 165-h of the New York Tax Law as to all of the *in rem* proceedings in connection with the property of Nora Brainard became conclusive.

November 24, 1954—Appellant filed a notice of appeal and return in the Court of Appeals pursuant to the aforesaid leave granted by the Appellate Division on June 1, 1954 (R. 19).

February 28, 1955—The Court of Appeals unanimously affirmed without opinion the order of the Appellate Division and answered the question certified in the affirmative (R. 19).

April 21, 1955—The Court of Appeals denied appellant's motion for reargument, granted appellant's motion for amendment of the remittitur to show that a question under the Constitution of the United States had been presented and necessarily passed upon, and stated that by its prior decision it held "that there was no denial of any constitutional right of the petitioner [the appellant]." (R. 21-22)

ARGUMENT

I

This appeal does not involve the constitutionality of Article VII-A, Title 3 of the New York Tax Law

A. Insofar as provision is therein made (1) for foreclosing tax liens by actions *in rem*, (2) for giving notice thereof by publication, by posting and by mail, (3) for opportunity to question the validity or the amount of the lien (4) for opportunity to question the regularity of the proceedings;

B. Insofar as no provision is therein made (1) for ascertaining whether the proceedings are against lands owned by infants or incompetents (2) for the appointment of a special guardian to protect the interests of possible infants and incompetents;

C. In respect to whether there has been compliance therewith;

D. In respect to the equal protection clause of the Fourteenth Amendment.

Appellant admits that "this case does not involve the invalidity of the taxing statute *per se*" (Br. p. 9).

Appellant does not claim that the provisions in Title 3 of Article VII-A of the New York Tax Law for foreclosing tax liens by actions *in rem*, for notice by publication, by posting and by mail, for opportunity to question the validity and amount of the lien do not satisfy the due

process requirements of Section 1 of the Fourteenth Amendment of the United States Constitution.

See,

Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526, 537;

Leigh v. Green, 193 U. S. 79;

Longyear v. Toolan, 209 U. S. 414, 418;

Ontario Land Co. v. Yordy, 212 U. S. 152, 156-158;

Horne et al. v. City of Ocala, 311 U. S. 608;

City of New Rochelle v. Echo Bay Waterfront Corp., 268 App. Div. 182 (2d Dept.) aff'd, 294 N. Y. 678, cert. den., 326 U. S. 720.

The first case cited held constitutional statutory procedures for foreclosures of tax liens by actions *in rem* which were substantially the same as those contained in Article VII-A, Title 3 of the New York Tax Law, and the last case cited involved Title 3 of Article VII-A of the New York Tax Law. See, also, *Chapman v. Zobelein*, 237 U. S. 135, 138.

Appellant does not and could not claim that the statute does not afford an opportunity to challenge the regularity of the foreclosure proceedings or that he has not had a reasonable time within which to do so by the procedure provided therefor.

Subdivision 7 of section 165-h of the New York Tax Law makes the giving of a deed following a judgment of foreclosure of a tax lien only presumptive evidence of the regularity of the action (See, *Marx v. Hawthorn*, 148 U. S. 172). Under that subdivision the presumption of regularity only becomes conclusive after two years from the date of the record of such deed. The latter provision is not, as appellant says, (Br. p. 9) "the equivalent of forfeiture" but a statute of limitation within the constitutional power of the Legislature of the State of New York to enact, pro-

vided that a remedy exists and reasonable time is given to pursue that remedy. (See, *Saranac Land, &c., Co. v. Comptroller of N. Y.*, 177 U. S. 318; *Turner v. New York*, 168 U. S. 90; *Bardon v. Land & River Improvement Co.*, 157 U. S. 327, 333-334; *Terry v. Anderson*, 95 U. S. 628.)

Here the Courts of New York have determined that a remedy existed, to wit: an action to set aside the deed and that the procedure adopted by appellant was improper. This, appellant does not dispute. Under the practice of the State of New York a distinction is made between an action and a motion (See N. Y. Civ. Prac. Act §§ 4 and 13, and *Matter of Burge*, 203 Misc. 677, 681, rev'd on other grs. 282 App. Div. 219, aff'd, 306 N. Y. 811). Moreover, even if appellant's motion could be treated as the equivalent of an action to set aside the deed, there still would not be compliance with the statute since no notice of pendency of the action was filed (§ 165-h, 7).

Here the Courts of New York have inferentially determined that appellant had a reasonable time to pursue that remedy. This, appellant does not dispute. Furthermore, since appellant was advised by judicial decision of the existence of this remedy and the necessity of pursuing it nearly a year before the statute of limitation had run against it he would not be heard to say that the period of limitation was unreasonable.

Appellant admits (Br. pp. 8-9) that upon a default judgment must be entered directing the collecting officer of the tax district to prepare and execute a deed conveying title to the parcel or parcels concerned regardless of whether owned by an infant or an incompetent (See, *Johnson v. Smith*, 297 N. Y. 165, 171, and cases cited; 2 Cooley on Taxation, 4th Ed. § 585; 3 Cooley on Taxation, 4th Ed. § 2532), and appellant does not contend that the New York statute

is repugnant to the due process clause of the Fourteenth Amendment because no provision is made to ascertain whether proceedings under the statute are against lands owned by infants or incompetents or because no provision is made for the appointment of a Special Guardian to protect the interests of possible infants and incompetents. (See *City of Utica v. Proite*, 178 Misc. 925, aff'd, 288 N. Y. 477; *Ballard v. Hunter*, 204 U. S. 241, 254-255.)

To make the validity of tax titles dependent upon whether the owners of the lands proceeded against were adults of sound mind would "render havoc with titles to real property so acquired". Appellant disclaims seeking any such ruling (Br. p. 15).

Furthermore, the rights of appellant's incompetent have not been lost for lack of appointment of a guardian. Appellant was appointed her guardian long before the statute of limitation had run against the right to bring an action, and appellant had been judicially made aware of the existence of the remedy nearly a year before it expired. The incompetent's rights were lost because appellant chose to ignore judicial advice. Even if he had reasonable grounds for questioning the soundness of the Court's decision, he could have brought an action and still have challenged by appeal the Court's decision.

Appellant concedes (Br. pp. 6, 10, 14) that there was strict compliance with the provisions of Article VII-A, Title 3 of the New York Tax Law.

Although in the questions said to be presented (Br. pp. 2-3) appellant asserts that there has here been a denial of equal protection of the laws, nowhere in the brief is there any specification or argument in support thereof. In the conclusion to the brief relief is sought only on the ground of lack of due process.

The constitutionality of the provisions of Article VII-A, Title 3 of the New York Tax Law generally is not involved in this case. This appeal involves solely the question whether the Town of Somers has deprived appellant's incompetent of her property without due process of law in applying those provisions.

II

The Town of Somers did not deprive appellant's incompetent of her property without due process of law in complying with Article VII-A, Title 3 of the New York Tax Law:

As noted above, appellant does not question that the Town of Somers complied with the provisions of Article VII-A, Title 3 of the New York Tax Law. Appellant's only complaint is that the notice provided in Title 3 was insufficient because upon investigation the officials of the Town could have discovered "the mental capacity of said Nora Brainard". The statute provides for no such investigation and no such investigation is essential to due process of law. (See, *City of New Rochelle v. Echo Bay Waterfront Corp.*, *supra*, 268 App. Div. 182 (2d Dept.) *aff'd*, 294 N. Y. 678, cert. den. 326 U. S. 720; *City of Utica v. Proite*, *supra*, 178 Misc. 925, *aff'd*, 288 N. Y. 477; *Johnson v. Smith*, *supra*, 297 N. Y. 165, 171; 2 Cooley on Taxation, 4th Ed. § 585; 3 Cooley on Taxation, 4th Ed. § 2532.) Indeed, as shown above, appellant does not claim otherwise. But, he says, the officials of the Town were derelict in their duty to inform the Court of Nora Brainard's mental capacity. However, at the time the foreclosure judgment was entered, Nora Brainard had not been declared an incompetent and there is no evidence in the record to support a finding that at that time she was an incompetent. But, assuming that the offi-

cials of the Town knew or should have known that she was an incompetent and that, therefore, the notice given would be insufficient, it was not the insufficiency of the notice of redemption that caused the incompetent to lose her property. The incompetent lost her property because appellant, her committee, did not pursue the due process the law provided. Had appellant brought the proper action within the ample time available to him after he was judicially advised to do so, and had he been able in that action to establish that the incompetent's failure to redeem had been brought about by a dereliction in duty on the part of the responsible officials of the Town, he could have obtained the relief he sought by this motion. To remedy his own neglect, appellant would now have this Court declare the statutes of New York unconstitutional.

Assuming, on the other hand, that appellant can be heard to say that the incompetent's property has been taken without due process of law because the conclusive presumption of Subdivision 7 of section 165-h of the New York Tax Law is no bar in favor of the Town where the running of the statute of limitation was brought about in part by dereliction of its officials (*Martin v. Barbour*, 140 U. S. 634, 646), the record on this appeal will not support a finding of such dereliction. The implications of fraud and dereliction are based solely on an "opinion" of the attorney for appellant that "Nora Brainard was and has been an incompetent for more than 15 years" before this foreclosure action was brought and on a statement by appellant that at some undisclosed time after the judgment of foreclosure was entered he "learned of the mental capacity of said Nora Brainard" (R. 5, 9-10). It is of legitimate concern to the State of New York that the conclusive presumption of Subdivision 7 of section 165-h of the New York Tax Law should not be nullified, and that the validity of tax titles should

not be subject to challenge on such speculative and inconclusive averments.

Conclusion

As the Court of Appeals of the State of New York held, there was no denial of any constitutional right of appointment as committee for the incompetent and the order of that Court should therefore be affirmed.

Dated: March 7, 1956.

Respectfully submitted,

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